LEE CHOO YAM HOLDINGS SDN. BHD. & ORS.

v.

KHOO YOKE WAH & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. D2-31-198-1988]
16 DECEMBER 1988

PARTNERSHIP: *Managing partner died - Bank accounts frozen - Split in partnership - Dissolution of partnership in issue - Monies received not accounted for - Assets in jeopardy - Receiver appointed - Receiver to be an independent person - Need not disclose name of receiver at the time of making application name must disclosed at the time of appointment.*

CIVIL PROCEDURE: *Affidavit affirmed prior to filing of application - Irregularity cured by reswearing and refiling affidavit.*

This was an application for an order to appoint an interim receiver to manage the business of a partnership which was engaged in the business of goldsmiths and jewellers. The parties were partners. Since the firm started business, the constitution of the partners had changed several times. The death of one of the partners who was the sole signatory of cheques issued in the firm's name resulted in three bank accounts being frozen. The deceased partner had caused a split in the partnership when he took over as the managing partner. The defendants were aligned with him. Since his death, the defendants continued operating the business. The deaths of two other partners did not result in the dissolution of the firm. Both parties submitted the names of their nominees to be appointed as receiver.

There were preliminary objections raised that the affidavit in support of the application was affirmed before the application was filed and that the identity of the interim receiver was not disclosed by the applicants.

Held:

[1] The affidavit in support of the application which was affirmed before the application was filed was irregular. Since the defendants had not been prejudiced, the plaintiffs were allowed to have the affidavit resworn and refiled.

[2] As long as the name of the receiver was submitted when the appointment was made it was sufficient for the plaintiffs to show the nature of their interest in the property which was required to be protected at the time the application was made.

[3] The firm's assets were in jeopardy and the defendants had not disclosed where the monies received from the business had been banked into. The dissolution of the partnership was in issue when the managing partner died. In the circumstances, an interim receiver should be appointed.

[4] The person appointed as a receiver had to be an independent person. The defendant's nominee was not an independent person as the deceased partner who had been managing the firm to carry out some services for the firm. The plaintiffs' nominee was appointed as interim receiver upon him providing security in the form of a guarantee for RM50,000 within a week.

[Application allowed with costs.]

Cases referred to:
Ong Heok & Anor. v. Ooi Bee Tat & Ors. [1982] 2 MLJ 326
Lau Yeok Lin & Ors. v. Hip Soon Engineering & Construction Sdn. Bhd. [1988] 1 CLJ (Rep) 685
The "Sri Melati" [1976] 1 MLJ 282

Legislation referred to:
Partnership Act 1961, s. 35(1)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 39 para. 826 & p. 417
The Law Relating to Receivers and Managers, p. 261 - Hubert Picarda

For the plaintiffs - C. Das (Krishna Aiyerwith him) M/s. Majid Krishna, Menon & Co.
For the defendants - Sri Ram (Joseph Yeowith him) M/s. Sri Ram Zulkifly & Kumar.

JUDGMENT

Siti Norma Yaakob J:

Two preliminary objections were raised by the defendants on the hearing of the plaintiffs' application for the appointment of an interim receiver, namely,

1) the admissibility of the affidavit in support of the originating summons which was also relied in support of the application.

2) reliance on 2 other affidavits, both affirmed on 14 October 1988.

The objection to the plaintiffs' affidavit is that it was sworn on 30 September 1988, a day before the issue of the originating summons which is also dated 1 October 1988, and as such the affidavit is valueless and inadmissible and cannot be relied upon to support the plaintiffs' application. The same situation arose in *Ong Heok & Anor. v. Ooi Bee Tat & Ors.* [1982] 2 MLJ 326 and in *Lau Yeok Lin & Ors. v. Hip Soon Engineering & Construction Sdn. Bhd.* [1988] 1 CLJ (Rep) 685 and in both cases the Courts held that as there was no evidence of any impropriety, the difference of one day could not possibly affect the validity of the affidavit.

In the case of *The "Sri Melati"* [1976] 1 MLJ 282, a 2 day difference was apparent between the signing of an affidavit and the issue of the writ, and Arulanandom J held that on the facts of that particular case as there was no question of the defendants being prejudiced or adversely affected by the contents of the affidavit, the objection as to its admissibility was baseless.

The effect of affidavits sworn before action is best expressed by *Halsbury's Laws of England*, 4th Edn. Vol. 39 at para. 826 as following

> An affidavit sworn before action is valueless, even though filed after issue of the writ, but the Court sometimes makes an order on such an affidavit, the applicant undertaking to have it resworn and refiled.

Since the defendants have admitted that the plaintiffs' affidavit is in no way defective and as such they have not been unduly prejudiced, but perhaps irregular, I had all the same allowed it to be used conditional upon the plaintiffs' reswearing and refiling another similar affidavit which they did on the very day of the hearing of the application.

The other objection taken is that the name of the proposed receiver is left blank in the application, thereby giving no indication as to the identity of the proposed receiver. Added to this was the fact that there was no letter of consent from the proposed receiver, signifying his willingness to accept the appointment, no written undertaking on his part to provide

security upon appointment, and neither is there an affidavit of fitness lodged together with the application. The plaintiffs do not dispute that they had omitted to attach all the documents complained of by the defendants but their Counsel explained that the plaintiffs were pressed for time and had since remedied the situation by filing and serving a supplementary affidavit identifying the proposed receiver and enclosing his consent to act, 3 days before the hearing of the application, and had also on the morning of the hearing of the application, filed and served an affidavit of fitness.

I see nothing objectionable to the plaintiffs not disclosing the identity of the proposed receiver at the time the application was filed and served as all that is required to be disclosed in such an application is the nature of the applicant's interest in the property that is required to be protected and the grounds on which he alleges that it is just and convenient that a receiver should be appointed. It is only when a named person is asked to be appointed that an affidavit of his fitness for the post is required. (See *Halsbury's Laws of England*, 4th Edn., Vol. 39, p. 417).

What is more important is that the identity of the proposed receiver should be made known to the Court at the time the order of appointment is made supported by the evidence of his fitness and willingness to act. All these evidence were before me at the hearing although the undertaking to give security is not present but I do not consider that the omission to give such an undertaking by the proposed receiver is crucial to the plaintiffs' case as security will be imposed in any event when the Court orders the appointment of a receiver under O. 30 r. 2(1) and (2). There is no provision in law requiring an undertaking on security to be given by a proposed receiver before his appointment can be ordered.

Objection was also taken as to the capacity of the person deposing the affidavit of fitness. The defendants contend that only a solicitor who has no conduct in the proceedings can file such an affidavit.

Hubert Picarda at p. 261 of his book on *"The Law Relating to Receiver and Mangers"* identifies the person who can swear an affidavit of fitness to a solicitor, who is not the solicitor to the applicant or the solicitor acting for the proposed receiver in the application, or to some other professional person who knows the proposed receiver personally. In this case, the affidavit was filed by a professional, an accountant who had known the proposed receiver for 13 years and since no disqualification is attached to such a deponent, his affidavit is very much in order.

Having dealt with the preliminary objections, I shall now consider the merits of this application and all I need concern myself is

1) whether there are circumstances disclosed in the plaintiffs' affidavits to warrant the appointment of an interim receiver.

2) if so, whether the proposed receiver is a fit and proper person to be appointed to such a post.

Both the plaintiffs and defendants in this originating summons are partners of Tai Kwong Goldsmiths & Jewellers (the firm) and as the name suggests are engaged in the business of goldsmiths and jewellers. The firm started business on 15 September 1958 and throughout the years there had been several changes to the firm particularly in the constitution of the partners.

The 1st plaintiff became a partner on 30 April 1982, soon after its incorporation after 3 of the firm's partners had withdrawn from the partnership. Two of these former partners are directors of the 1st plaintiff and one of them, Lee Hoong Seng (Lee), had affirmed the affidavit in support of the application on behalf of all the plaintiffs. Between 1980 - 86, Lee was actively involved in the management of the firm and was entrusted with its day to day affairs. The 1st plaintiff with a holding of 27% is the only single partner with the highest percentage of shares in the firm, with 12 other partners holding a lower percentage of the remaining shares.

The 2nd defendant became a partner in October 1984, taking over his father's share in the partnership following the latter's death but there is no disclosure in the affidavits how the other 11 partners came into the partnership.

Then in February 1986, a change in the management of the firm occurred when the most senior partner, Lee Choo Meng, with a holding of 22.5%, took over the running of the business from Lee and became the sole signatory of all cheques issued by the firm. This changeover in management has also brought about a split in the partnership as there were now 2 groups of partners opposed to each other. This was apparent when the new managing partner together with the 7 defendants in this originating summons filed CS 22-91-86 against Lee, the 3 plaintiffs, and 3 others, alleging that Lee had abused the trust when he was entrusted to manage the firm from December 1981 - February 1986, and had acted fraudulently to the detriment of the firm and its partners, with the knowledge and assistance of the plaintiffs in the instant originating summons. In their defence, Lee and the plaintiffs have counterclaimed that since he took over the management of the firm, Lee Choo Meng had been secretive and oppressive and had completely ignored or excluded the 3 plaintiffs from the firm and have claimed, *inter alia*, the dissolution of the partnership. This civil suit was part heard before Razak J.

Then in April and August this year, 2 of the partners died. The death of Ngai Ngan Tong on 29 April 1988 did not pose any problem to the other partners but the death of Lee Choo Meng (the deceased) on 25 August 1988, had far reaching effects as the deceased was the sole signatory of all cheques issued in the name of the firm and since his death, all the 3 accounts operated by the firm with 3 commercial banks have been confirmed to have been frozen. Since the day to day business of the firm is carried out both by way of cash transactions which comes to no less than RM10,000 daily, and by way of cheques, the plaintiffs who have been excluded from the partnership do not know where such cash and cheques have been banked into. There is every likelihood that they would not have been credited into the firm's 3 accounts as moneys cannot be withdrawn from these frozen accounts. The matter is aggravated further by the fact that notwithstanding the deceased's death, the defendants have continued managing and operating the business as if there had been no change in the status of the partnership but more importantly conducting such business without banking in any of the recoverables. It is to protect such assets of the partnership which the plaintiffs claim are now in jeopardy that the present application is founded. Moreover under s. 35(1) of the Partnership Act 1961, the death of the deceased has the effect of dissolving the partnership as there is no agreement between the partners that the death of one of them should not have such an effect.

The defendants have sought to allay the plaintiffs' fears that the firm's assets are safe by being agreeable to render the audited accounts of the firm during the period of the deceased's death until the accounts become operational, to the plaintiffs. This to me, provides little

comfort to the plaintiffs as they do not trust the defendants any longer as can be seen from the allegations and counter allegations of fraud they had thrown at each other in the civil suit before Razak J.

The defendants reply to their assuming the management of the partnership after the deceased's death stems from the following circumstances.

1) That the deceased's widow an executrix, has since been allowed to be substituted as a party to the civil suit before Razak J in place of the deceased. This is all well and good as far as the cause of action in that civil suit is concerned but on the facts of the case before me and bearing in mind that there is no agreement between the parties that the death of the deceased should not dissolve the partnership, that argument cannot possibly succeed. Evidence of there being no agreement as to the status of the partnership after death is apparent from the conduct of the plaintiffs refusing to execute the forms to verify a change in the partnership brought about by the death of the 2 partners.

2) Past conduct of the surviving partners following the deaths of 2 other partners, Lee Toh Seng in 1982 and Lee Sin in 1984 had raised an implied agreement that the death of any partner should not dissolve the partnership and the plaintiffs are now estopped from denying that the deaths of the 2 partners in 1988 had the effect of not dissolving the partnership.

In determining whether there is such an implied agreement, the subsequent conduct of the surviving partners following the deaths in 1988 are equally relevant as to the past conduct of the surviving partners after the deaths of the partners in 1982 and 1984. There were no problems posed by the deaths of the 2 parties in 1982 and 1984 as the partners were not disputing amongst themselves. The surviving partners had then agreed to carry on with the partnership with the next-of-kins of the 2 deceased partners coming in and managing the partnership. But however the situation is no longer the same after the deaths of the other 2 partners in 1988. Since 1986, there has been animosity between 2 groups of partners and the civil suit before Razak J is itself testimony to that fact, so also the unwillingness on the part of the plaintiffs to execute any forms to verify any change in the partnership. From the evidence, it is clear that there is no consistency in the past conduct of the surviving partners following the deaths of the 2 partners in 1982 and 1984 to the subsequent conduct of the surviving partners after the 2 deaths in 1988 and this in itself negatives any conclusion that there has been an estoppel by conduct.

Considering the facts of this case from all perspectives, I find that the plaintiff's fears over the firm's assets being in jeopardy are well founded as nowhere in their affidavits have the defendants disclosed where all the recoverables of the business have been banked into. It is under such circumstances that the appointment of an interim receiver becomes highly preferable. This seems more so when the dissolution or otherwise of the partnership is hotly disputed.

If I am wrong in holding that the partnership has been dissolved, the plaintiffs must show special grounds for the application and I consider that the protection of the firm's assets is in itself a special ground when an interim receiver should be appointed.

Lastly, delay in bringing this originating summons was also pleaded by the defendants but here again I see no merits to this objection as the change effecting the partnership happened only in August 1988 with the death of the managing partner and sole signatory of the firm.

Having ruled that the appointment of an interim receiver is most appropriate in this case, I now consider who is fitted to the post as I have 2 nominees, Mr. Kwong Lee Yoon, a chartered accountant since 1969, who has been nominated by the plaintiffs and Mr. Foong Weng Chee, also a chartered accountant since 1974, nominated by the defendants.

Unlike the plaintiffs' nominee, the defendants' nominee has had dealings with the firm, as Lee had retained him as a tax agent and adviser for the firm since 1981 and with some knowledge of the business of the firm is in a better position to act as an interim receiver.

As a matter of principle, a person appointed a receiver must be an independent person who has no interest whatsoever in any matter between any disputing parties. In this case the affidavit of fitness on Mr. Foong Weng Choo is affirmed by Mr. Peter K.C. Yeoh, an advocate and solicitor, who also attested the will of the deceased. Although I am fully aware that the service of Mr. Foong Weng Choo would be a convenient arrangement, on the facts of this case, I consider that a totally independent person would be a more appropriate choice so as to alleviate any conclusion as to bias or partiality. On that finding, I had ordered that Mr. Kwong Lee Yoon be appointed an interim receiver in terms of prayer (1) of the application upon him providing security in the form of a guarantee in the sum of RM50,000 within 1 week hereof and that he is entitled to assume his appointment as soon as the guarantee has been provided. I also ordered that the defendants pay the costs of this application.

Also found at [1989] 1 CLJ 946